

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-4132

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

LAY FACULTY ASSOCIATION, LOCAL 1261,
AMERICAN FEDERATION OF TEACHERS,
AFL-CIO,

Petitioner,

- against -

NATIONAL LABOR RELATIONS BOARD,

Respondent,

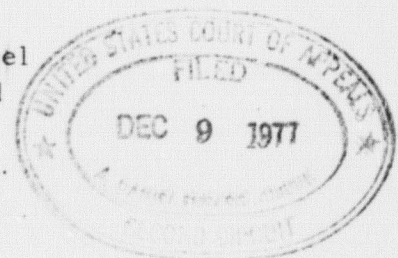
For Review of an Order of the
National Labor Relations Board

JOINT APPENDIX

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One Battery Park Plaza
New York, New York 10004
(212) 483-9000



Index No. 77-4132

LAY FACULTY ASSOCIATION, LOCAL 1261,
AMERICAN FEDERATION OF TEACHERS,
AFL-CIO,

Petitioner,
against

Plaintiff

NATIONAL LABOR RELATIONS BOARD

Respondent.

Defendant

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 220 W. 24th St.,
New York, NY 10011

That on December 9, 1977 deponent served the annexed

Joint Appendix and Exhibits to Joint Appendix
on Elliott Moore, Esq. and Simpson, Thacher & Bartlett, Esqs.
attorney(s) for One Battery Park Plaza New York, NY and
in this action at 1616 Pennsylvania Ave., NW, Washington, DC
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.

Sworn to before me
this 9 day of December, 1977.

Linda Feldman

The name signed must be printed beneath

Linda Feldman

Anne Dente
ANNE DENTE
NOTARY PUBLIC, State of New York
No. 24-4018003
Qualified in Kings County
Commission Expires March 30, 1979

PAGINATION AS IN ORIGINAL COPY

INDEX TO EXHIBITS TO JOINT APPENDIX

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EXHIBIT 3 -Respondent's Exhibits	423-E

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of: Lay Faculty Association,
Loc 1261 American Federation
of Teachers, AFL-CIO

Case Nos.: 29-CA-4845 & 4993

2. 3.76	Charge filed in Case No. 29-CA-4845
5.10.76	Charge filed in Case No. 29-CA-4993
5.27.76	Acting Regional Director's Order consolidating cases, Complaint and Notice of Hearing, dated
6.15.76	Petitioner's Answer to Complaint, received
7.27.76	Hearing Opened
9. 2.76	Hearing Closed
10.29.76	St. Ann's Episcopal School's Motion to Correct the Transcript, received
2. 7.77	Administrative Law Judge's Decision, issued
3.14.77	Petitioner's Exceptions to the Administrative Law Judge's Decision, received
6.10.77	Decision and Order issued by the National Labor Relations Board

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

INSTRUCTIONS: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 29-CA-4845

Date Filed 7/2/76

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer Episcopal Diocese of Long Island and St. Ann's Episcopal School - Joint Employers
b. Number of Workers Employed 100
c. Address of Establishment (Street and number, city, State, and ZIP code) see attached
d. Employer Representative to Contact Mr. Stanley Bosworth
e. Phone No. 522-1660
f. Type of Establishment (Factory, mine, wholesaler, etc.) Non-public secondary school
g. Identify Principal Product or Service Education

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (3) and (4) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Since on or about September 1, 1975, the Employer through its officers, agents, and representatives, to wit, supervisors of St. Ann's Episcopal School, operated by St. Ann's Episcopal Church as agent for the Episcopal Diocese of Long Island, have interfered with, restrained and coerced, and are interfering with restraining and coercing their employees because of their membership in and/or activities on behalf of Lay Faculty Association, Local 1261, American Federation of Teachers, AFL-CIO, a labor union, and because they field charges with and signed affidavits for the National Labor Relations Board by harassing them, evaluating them as unsatisfactory employees, manifesting an intention to discharge them, and deliberately creating an atmosphere calculated to chill an interest in unionism, through intimidation.

By the acts set forth above, and by other acts and conduct, the Employer through its officers, agents, and representatives, has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing its employees with reference to their rights guaranteed in section 7 of the National Labor Relations Act.

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)

Lay Faculty Association, Local 1261, Am. Federation of Teachers, AFL-CIO

4a. Address (Street and number, city, State, and ZIP code) 175-20 Wexford Terrace
Jamaica Estates, New York 11432
4b. Telephone No. 297-2020

5. Full Name of National or International Labor Organization of which it is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)
American Federation of Teachers, A.F.L. - C.I.O.

6. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By Robert M. Gordon, President
(Signature of representative or person filing charge) (Title, if any)
175-20 Wexford Terrace
Address Jamaica Estates, NY 11432 658-2977 January 20, 1976
(Telephone number) (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

FORM NLRB-501 (2-67)		Form Approved Budget Bureau No. 64-R601.12	
UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD CHARGE AGAINST EMPLOYER			
INSTRUCTIONS: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.		DO NOT WRITE IN THIS SPACE	
		Case No. 29-CA-4993	Date Filed 5-10-76
1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT			
a. Name of Employer Episcopal Diocese of Long Island et alia (Cf. attachment)		b. Number of Workers Employed 90	
c. Address of Establishment (Street and number, city, State, and ZIP code) Cf. attachment		d. Employer Representative to Contact Mr. Stanley Bosworth	e. Phone No. 522-1660
f. Type of Establishment (Factory, mine, wholesaler, etc.) Non-Public School		g. Identify Principal Product or Service Education	
h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (3) and (4) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.			
2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)			
Since on or about April 29, 1976, the Employer through its officers, agents, and representatives, to wit, supervisors of St. Ann's Episcopal School, operated by St. Ann's Episcopal Church as agent of the Episcopal Diocese of Long Island, has discharged R. Nicholas Hoffmann, a member of Employer's faculty, because he filed charges against the Employer with the National Labor Relations Board, signed affidavits for the Board, appeared at a Board hearing, and because of his activities on behalf of Lay Faculty Association, Local 1261, American Federation of Teachers, AFL-CIO, a labor union. By the acts set forth above, and by other acts and conduct, the Employer, through its officers, agents, and representatives, has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing its employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act.			
By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.			
3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)			
Lay Faculty Association, Local 1261, American Fed. of Teachers, AFL-CIO			
4a. Address (Street and number, city, State, and ZIP code) 175-20 Wexford Terrace Jamaica Estates, New York 11432			4b. Telephone No. 297-2020
5. Full Name of National or International Labor Organization of which it is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization) American Federation of Teachers, A.F.L. - C.I.O.			
6. DECLARATION			
I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.			
By Robert M. Gordon (Signature of representative or person filing charge)		Robert M. Gordon, President (Title, if any)	
Address 175-20 Wexford Terrace Jamaica Estates, NY 11432		658-2977 (Telephone number)	May 3, 1976 (Date)
WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)			

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

ST. ANN'S EPISCOPAL SCHOOL

and

Case Nos. 29-CA-4845 ✓
29-CA-4993

LAY FACULTY ASSOCIATION, LOCAL 1261,
AMERICAN FEDERATION OF TEACHERS, AFL-CIO

ORDER CONSOLIDATING CASES, COMPLAINT AND NOTICE OF HEARING

It having been charged in Case No. 29-CA-4845 by Lay Faculty Association Local 1261, American Federation of Teachers, AFL-CIO, herein called Local 1261, that St. Ann's Episcopal School, herein called Respondent, and in Case No. 29-CA-4993 by Local 1261, that Respondent has engaged in, and is engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C., Sec. 151, et seq., herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, by the undersigned Regional Director for Region 29, having duly considered the matter and deeming it necessary in order to effectuate the purposes of the Act, and to avoid unnecessary costs or delay,

HEREBY ORDERS, pursuant to Section 102.33 of the Board's Rules and Regulations - Series 8, as amended, that these cases be, and they hereby are, consolidated.

Said cases having been consolidated, the General Counsel of the Board, on behalf of the Board, by the undersigned Regional Director, pursuant to Section 10(b) of the Act and the Board's Rules and Regulations - Series 8, Section 102.15, hereby issues this Consolidated Complaint and Notice of Hearing and alleges as follows:

1. (a) The Charge in Case No. 29-CA-4845 was filed by Local 1261 on February 3, 1976, and served by registered mail upon Respondent on February 5, 1976.

(b) The Charge in Case No. 29-CA-0093 was filed by Local 1261 on May 10, 1976, and served by registered mail upon Respondent on May 12, 1976.

2. (a) The Respondent is a private non-sectarian elementary and secondary school located at 129 Pierrepont Street, Brooklyn, New York, where it is engaged in providing and performing educational and teaching services from kindergarten through the 12th grade.

(b) During the past year, which period is representative of its annual operations generally, Respondent, in the course and conduct of its operation, has derived gross revenue from tuition, fees and other sources in excess of \$1,000,000.

(c) During the past year, which period is representative of its annual operations generally, Respondent, in the course and conduct of its operations, purchased and caused to be transported and delivered to it, books, paper, teaching aids and supplies, educational equipment and other goods and materials valued in excess of \$50,000, of which goods and materials valued in excess of \$50,000 were transported and delivered to it in interstate commerce directly from states of the United States other than the State of New York.

(d) Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

3. Local 1261 is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

4. Stanley Bosworth, Brigdetta Kasper, William Everdell and Peter Cohen are, and have been at all times material herein, the headmaster, head of the upper school, curriculum consultant and chairman of the science department, respectively, of Respondent, acting on its behalf, and supervisors thereof, within the meaning of Section 2(11) of the Act.

5. On October 28, 1975, Respondent, Patricia Palmieri and Robert Nicholas Hoffman, individuals, and the General Counsel of the National Labor Relations Board entered into a stipulation in settlement of Case Nos. 29-CA-421 and 29-CA-4361.

6. On various dates during the months of September, October, November, December 1975 and January, February, March and April 1976, Respondent, by Bridgette Kasper, its head of the Upper School, William Everdell, curriculum consultant, and Peter Cohen, chairman of the science department, and by other agents and supervisors presently unknown, has harassed its employees by excessive classroom observations of their teaching abilities.

7. In or about January and May 1976, Respondent, by Peter Cohen, chairman of the science department, prepared and made unfavorable evaluations of the performance of its employee, Robert Nicholas Hoffmann, and has maintained said unfavorable evaluations in the individual personnel file of said employee.

8. On or about April 29, 1976, Respondent, by Peter Cohen, its chairman of the science department, notified Robert Nicholas Hoffmann that his contract would not be renewed for the 1976-1977 academic year and that his employment would be terminated at the close of the 1975-1976 academic year.

9. Since the date of said notification as described above in paragraph 8, Respondent has failed and refused to renew, or offer to renew, the contract of its employee, Robert Nicholas Hoffmann, for the 1976-1977 academic year.

10. (a) Respondent engaged in the conduct described above in paragraphs 6, 7, 8 and 9, because said employee joined and assisted Local 1261, engaged in other concerted activity for the purpose of collective bargaining and mutual aid and protection.

(b) Respondent engaged in the conduct described above in paragraphs 6, 7, 8 and 9, because said employee filed charges in Case No. 29-CA-4361 and gave testimony under the Act.

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11. By the acts described above in paragraphs 6 through 10, and by each of said acts, Respondent interfered with, restrained and coerced, and is interfering with, restraining and coercing, its employees in the exercise of the rights guaranteed in Section 7 of the Act, and thereby engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

12. By the acts described above in paragraphs 6 through 10, and by each of said acts, Respondent discriminated, and is discriminating, in regard to the hire and tenure and terms and conditions of employment of its employees, thereby discouraging membership in a labor organization, and thereby engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and Section 2(6) and (7) of the Act.

13. By the acts described above in paragraphs 6 through 10, and by each of said acts, Respondent discriminated, and is discriminating, against an employee for having filed charges and giving testimony under the Act, and thereby engaged in, and is engaging in, unfair labor practices affecting commerce within the meaning of Section 8(a)(4) and Section 2(6) and (7) of the Act.

14. The acts of Respondent described above in paragraphs 6 through 10, occurring in connection with the operations of Respondent, described above in paragraph 2, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

PLEASE TAKE NOTICE that on the 14th day of _____, 1976 at 10:00 a.m. at 16 Court Street, fourth floor, in the Borough of Brooklyn, City and State of New York, and on consecutive days thereafter until concluded, a hearing will be conducted before a duly designated Administrative Law Judge of the

National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Statement of Standard Procedures In Formal Hearings Held Before The National Labor Relations Board In Unfair Labor Practice Cases, is attached.

YOU ARE FURTHER NOTIFIED that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to the said Complaint within ten (10) days from the service thereof, and that unless it does so, all the allegations in the Complaint shall be deemed to be admitted by it to be true and may be so found by the Board. Immediately upon the filing of its answer, Respondent shall serve a copy thereof on each of the other parties.

Dated at Brooklyn, New York, this 27th day of May, 1976.

Harold L. Richman

Harold L. Richman
Acting Regional Director, Region 29
National Labor Relations Board
16 Court Street
Brooklyn, New York 11241

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

-----x

ST. ANN'S EPISCOPAL SCHOOL	:	Cases Nos.
and	:	29-CA-4845
	:	29-CA-4993
LAY FACULTY ASSOCIATION,	:	
LOCAL 1261, AMERICAN	:	
FEDERATION OF TEACHERS,	:	
AFL-CIO.	:	
	:	

-----x

ANSWER TO COMPLAINT

Pursuant to Sections 102.20 and 102.21 of the National Labor Relations Board's Rules and Regulations, St. Ann's Episcopal School, by its attorneys Simpson Thacher & Bartlett, for its Answer to the Consolidated Complaint herein:

1. Denies having knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 1(a) and 1(b) of the Complaint, but admits receiving a copy of the charges purportedly filed by Local 1261.

2. Admits the allegations contained in Paragraphs 2(a), 2(b), 2(c) and 2(d) of the Complaint, except denies that it provides educational and teaching services for kindergarten students.

3. Upon information and belief admits the allegations contained in Paragraph 3 of the Complaint.

4. Denies the allegations contained in Paragraph 4 of the Complaint but admits that Stanley Bosworth is the headmaster, that Brigid Barry is the head of the upper school, that Peter Cohen was the Chairman of the Science Department, and that William Everdell is a Curriculum Consultant.

5. Admits the allegations contained in Paragraph 5 of the Complaint, and refers to said stipulation for its terms and effect, but moves to strike the allegations regarding a prior stipulation agreement.

6. Denies the allegations contained in Paragraph 6 of the Complaint.

7. Denies the allegations contained in Paragraph 7 of the Complaint but admits that evaluations of the performance of its employees were made and that such evaluations were placed in individual employee personnel files.

8. Admits the allegations contained in Paragraph 8 of the Complaint.

9. Denies the allegations contained in Paragraph 9 of the Complaint, but admits that it has not offered to renew the contract of Robert Nicholas Hoffmann for the 1976-1977 academic year.

10. Denies the allegations contained in Paragraph 10(a) and 10(b) of the Complaint.

11. Denies the allegations contained in Paragraph 11, 12, 13 and 14 of the Complaint.

WHEREFORE, Respondent moves that the Complaint be dismissed in its entirety.

Respectfully submitted,

SIMPSON THACHER & BARTLETT
Attorneys for St. Ann's
Episcopal School
Office and P.O. Address
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

JAMES S. FRANK,

Of Counsel.

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

----- x

In the Matter of :

ST. ANN'S EPISCOPAL SCHOOL, : Cases Nos.
Respondent, : 29-CA-4845
and : and
: 29-CA-4993

LAY FACULTY ASSOCIATION, LOCAL 1261, :
AMERICAN FEDERATION OF TEACHERS, :
AFL-CIO, :

Charging Party. :

----- x

MOTION TO CORRECT
THE TRANSCRIPT

Pursuant to Section 102.26 of the Board's Rules
and Regulations, Respondent hereby moves that the transcript
of the hearing in this matter be corrected as follows:

<u>Page</u>	<u>Line</u>	<u>Reported</u>	<u>Should be</u>
6	17	Casper	Cosper
7	7	Peter Cohn	Peter Cohen
		(error repeated on subsequent pages)	
10	5	Palmeiri	Palmieri
14	24	affected	expected
17	12	Nicholaus	Nicholas
19	9	Florence Hamond	Florence Hammond
21	21	Meerendonk	Van Meerendonk
28	12	Ginkelstein	Finkelstein
33	12	sometimg	something
34	16	Marciano	Marchioro
		Elizabeth	Elisabeth
36	22	tolled	totalled

12

<u>Page</u>	<u>Line</u>	<u>Reported</u>	<u>Should be</u>
47	6	Rhoames	Ropes
		(error repeated on subsequent pages)	
54	5	Episcopal	Upper School
62	6	Lillian	Lilian
75	18	bopping	popping
77	23	Morganfeld	Morgenthal
95	18	personal	Personnel
99	2	signed	seen
	9	of	up
106	1	up for a	offered a
	15	minute	manner
109	19	sick	specific
113	6	Hertzfeld	Herzfeld
131	20	Madison	Matison
140	16	Golander	Golodner
144	13	Neil	Niel
	20	Ickenbaum	Kirschenbaum
145	8	Mathew	Matthew
148	3	Lamizar	Lamazor
		Ickenbarry	Eikenberry
	4	Garmant	Garment
155	1	Clare	Claire
157	24	left	let
158	3	a	I
	14	George	Georg
	18	Panella	Pennell
	19	Littner	Leitner
159	16	Hershberg	Hershon
169	3	Alchem's Raysor	Occam's Razor
175	21	good	about
177	6	contrary	concrete
	12	make	write
202	2	Hoffman	Hoffmann
	10	Everdel	Everdell
		(error repeated on subsequent pages)	
208	3	recommended	reported
209	2	Shrbell	Sherbell
211	3	Berry	Barry
214	17	Littner	Leitner
220	23	he	they
222	10	Balou	Ballou
225	10	input	input
	12	input	input
228	8	come	some
229	6	week	year
237	17	as	on
238	16	Delete: Miss Kave:	
	23	Add: Miss Kave:	

<u>Page</u>	<u>Line</u>	<u>Reported</u>	<u>Should be</u>
240	21	liberal	literal
245	14	Boswoth	Bosworth
259	21	Cassil	Cassell
262	4	of	or
273	1	form design	norm designed
275	1	work	worse
277	3	forms	norms
279	22	Mat Levine	Matt Labine
288	1	speak	think
298	23	Hoffman	Hoffmann
299	2	leave	lead
301	2	LaSant	Rossant
304	13	PS	BS
311	1	class in	class work in
313	3	with the	is
326	2	your	you
	4	oran	orange
343	2	complaint	contract
400	15	Jules Cohen	Julius Cohn
		(error repeated on subsequent pages)	
405	25	Mr. Hoppin	Mrs. Kaufman
410	7	Lloyd	Logue
411	19	transferred	transcripts
413	7	Dunn	Dunne
424	18	Cynchia	Cynthia
	20	Brightmurier	Braitmeyer
440	16	Kaminef	Kameneff
443	8	Miss	Mr.
447	1	"Teacher Macy"	Pia Massie
	3	Irwin	Erwin
461	14	Pierpont	Pierrepoint
	17	100	11201
463	10	Phychometrics	Psychometrics
465	12	philosoph	philosophy
466	2	simple	principle
469	18	yes	yet
470	12	anyone of	somewhere in
475	12	passed	past
483	4	a nature	supervisor
	6	nature	teacher
484	20	didn't to	didn't seem to
490	13	as	with
492	15	an informative	formative
	18	of	it
499	18	Remson	Remsen
502	22	admission	decision
503	15	abusive	obvious

<u>Page</u>	<u>Line</u>	<u>Reported</u>	<u>Should be</u>
507	6	reason	place
510	19	went	weren't
532	6	curve	clear
543	16	in	and
550	20	good faith	enough
553	16	Jeff	Geoff
	17	Shoshay	Schochet
	17	Chataalkash	Chatalbash
	20	Erica Froberg	Erika Forberg
555	25	Fred	Greg
556	1	Deutch	Deutsch
	2	Rose Ann Leaf	Roxanne Leef
	3	Dudley	Dougie
	15	Jaeger	Jarrett
	15	McShein	McShane
	17	Haveley	Haefele
558	15	teacher Linda	Peter Lynn
564	17	which I	which is
571	22	Montegue	Montague
576	9	Zoia	Zoya
705	10	yhe	the
706	16	sas	was
708	11	dase	case
713	1 & 2	in Vernest	Inverness
715	3	vew	few
	6	byond	beyond
717	7	Mary	Marion
724	19	cardoned	cordoned
725	21	flact	flat
729	7	sent	spent
	14	guggestions	suggestions
	25	class	period
736	24	aol	all
739	21	that I was	that it was
741	8	xtrenuously	strenuously
743	17	She	They
748	3	knew	known
751	19	one	once
752	2	yhtoughout	throughout
754	2	ever teacher	any teacher
756	11	tryout	trial
761	20	iids	kids
762	4	sid	said
	12	misdemeanor	discipline
765	1	than	the
766	24	eber	ever
771	3	race	face

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<u>Page</u>	<u>Line</u>	<u>Reported</u>	<u>Should be</u>
772	19	c-n	can
775	13	Purcell	Brousal
776	15	have	had
	17	in	and
	18	O	I
777	1	misreading	misleading
778	15	wh-t	what
781	10	6wo	two
783	1	Richard Berry	Brigid Barry
	4	seminars	semesters
	20	thix xeminar	this seminar
785	20	kinds	kids
		chanted	changed
788	22	Wenrib	Weinreb
789	1	turored	tutored
	4	he done	he had done
790	3	Suger	Zugor
792		Anthony Ficcio	
		address should be - - - - -	Local 2161 AFT
			260 Park Avenue South
			New York, New York
796	6	April 29, 1975	August 29, 1975
797	25	I	I am
798	18 or 19	CEB	CEEB
805	4	Lillian	Lilian
807	11	for	from
	17	test	text
821	25	S.B.	B.S.
830	20	stayed up	went up
833	25	simulate	assimilate
834	10	Hoffman	Hoffmann
836	12	Sol	Saul
837	13	to why	to your way
842	25	sophomores	seniors
848	14	in	and
	21	exceptionally	exceptional
851	10	Boswoth	Bosworth
	24	concern	confirm
852	1	positions	position

Respectfully submitted,

SIMPSON THACHER & BARTLETT
 Attorneys for St. Ann's Episcopal S
 Office and P. O. Address
 One Battery Park Plaza
 New York, New York 10004
 (212) 483-9000

JAMES S. FRANK,
 Of Counsel.

JD-70-77
Brooklyn, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

FEB 14 1977

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ST. ANN'S EPISCOPAL SCHOOL

and

Cases Nos. 29-CA-4845
29-CA-4993

LAY FACULTY ASSOCIATION,
LOCAL 1261, AMERICAN
FEDERATION OF TEACHERS, AFL-CIO

Martha R. Kave, Esq.,
of Brooklyn, NY, for
the General Counsel.
James S. Frank, Esq.
(Simpson, Thacher & Bartlett),
of New York, NY, for the
Respondent.
Anthony Ficchio and Robert M.
Gordon, of Jamaica Estates,
NY, for the Charging Party.

DECISION

Statement of the Case

JULIUS COHN, Administrative Law Judge: This case was tried at Brooklyn, New York on July 27 through 30 and September 2, 1976. On May 27, 1976 the Acting Regional Director for Region 29 issued an Order Consolidating Cases and a Complaint against St. Ann's Episcopal School, herein called Respondent. The complaint was based upon a charge filed by Lay Faculty Association, Local 1261, American Federation of Teacher, AFL-CIO herein called the Union, on February 3 and served on February 5, 1976; and a further charge filed by the Union on May 10 and served May 12, 1976. The issues framed by the pleadings herein are whether Respondent unlawfully harassed Robert N. Hoffmann, a teacher, by excessive classroom observations and unfavorable performance evaluations, and discriminatorily failed to renew his contract because of his concerted activities and his activities on behalf of the Union, and because he filed the charges and gave testimony under the Act. The Respondent filed an answer denying the commission of unfair labor practices.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue or to file briefs. Briefs were submitted by the General Counsel and Respondent and have been carefully considered.

Upon the entire record in the case 1/ and from my observation of the witnesses and their demeanor I make the following:

Findings of Fact

I. The Business of the Respondent

The Respondent is a private nonsectarian elementary and secondary school located at 129 Pierrepont Street, Brooklyn, New York, where it is engaged in providing and performing educational and teaching services from 1st through the 12th grade. In the course and conduct of its business operations during the past year Respondent has derived gross revenues from tuition, fees and other sources in excess of \$1 million. The Respondent in the course and conduct of its business operations during the past year, purchased and caused to be transported and delivered to its place of business, books, paper, teaching aides, school supplies and other goods and material, valued in excess of \$50,000 of which goods and materials valued at in excess of \$50,000 were transported and delivered to it from states of the United States other than the State of New York wherein its places of business is located. The Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (2) and (7) of the Act.

II. The Labor Organization Involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Background

Respondent, a nonsectarian day school founded in 1965, currently enrolls approximately 750 children in grades 1 through 12. The school caters to a student body consisting of very bright, sometimes talented children, who thrive in an atmosphere of challenge and motivation. The word "caters" is used here advisedly as the headmaster, Stanley Bosworth, makes perfectly clear that his policy is to cater to the desires of the

1/ With his brief, counsel for Respondent filed a Motion to Correct the Transcript. As the Motion relates to typographical and other minor errors, and there being no opposition thereto, it is hereby granted.

JD-70-77

children, with a view to their achieving to the maximum extent of their capabilities. Bosworth makes it equally clear that such policy does not apply to the handling and treatment of teachers. The students come first and the teachers last, in his view, as he is not concerned with democracy in his relationship with the teachers. Their job is to be understanding of the children, stimulate and motivate them to develop their own minds and ideas. While students are not graded, as such, in their courses, a wary eye, nevertheless, is focused on achievement test results in college entrance board examinations. The school prides itself on the great numbers of its students who graduate to the so-called better colleges and universities, and these test scores are, in part at least, the basis for their admission.

Robert N. Hoffmann taught at Respondent for 3 years, having been hired for the year commencing September 1973 as a teacher in the science department until the end of the school year in 1976 when his contract was not renewed by Respondent.

B. Concerted and Union Activities

At the end of 1974, some of the teachers were apparently disaffected with the administration of the school and as a result, seven persons including Hoffmann were elected to serve as a faculty committee. In the ensuing few months the committee met with Headmaster Bosworth a number of times and discussed various subjects relating to the teachers' contracts, curriculum and various working conditions. The faculty committee then discussed the possibility of union representation and Hoffmann was designated to investigate this matter. He went to the office of the Union and arranged for some of the teachers to meet with union representatives in March 1975. On April 1 the committee circulated a letter to all teachers urging that they opt for union representation, and describing the methods to be used for the selection of the Union, noting that the procedure would be conducted under supervision of the National Labor Relations Board. This letter was signed by the seven members of the committee. Charles Arent, a former teacher and committee member, testified that he had written the first draft; it was then revised by the committee who agreed that the first signer should be Hoffmann, most active member of the committee in making contact with the Union. Thereafter union cards were distributed by mail and in person and Hoffmann stated that he himself distributed cards and spoke personally to a number of teachers. In addition further meetings were conducted with the union representatives.

There is no question concerning the awareness by Respondent of the concerted activities not only of Hoffmann but of all the members of the committee since it is clear that Bosworth met perhaps 10 times with the committee and discussed as noted above various topics involving the teachers' working conditions. ^{2/} Moreover, within a week after the letter

^{2/} The record does not show whether the committee constitutes a labor organization. However it is clear that activities of the committee members were protected.

urging union representation was mailed by the committee, Bosworth replied to all teachers indicating his awareness of the union activity and his position contrary to unionization. During the period of these activities, a meeting of the teachers in the Science Department was held at the home of a teacher in February 1975. According to Hoffmann, during the course of this meeting Peter Cohen, the department Chairman, stated that Bosworth had characterized Hoffmann as an organizer. Cohen, in his testimony could not recollect making this remark, which, however, was corroborated by Arent whom I credit. Hoffmann further testified that at this meeting Cohen also informed him that he had been instructed by Bosworth to write something about Hoffmann which could be used in the future. 3/

It is the practice of Respondent to make observations of classroom teachers, principally conducted by the various department chairmen, but also by the heads of the particular school involved (lower, middle, or high school), the assistant headmaster or the headmaster himself. In addition commencing in the spring of 1975, a policy of written evaluations prepared by the chairman of the department concerning the performance of the teachers was instituted. Cohen's first evaluation of Hoffmann, made in May 1975, contained praise for Hoffmann's work in the physics class, a high school subject. However, Cohen stated that his middle school work needed improvement and found that problems stemmed from Hoffmann's lack of rapport with his classes and the amount of time he spent attempting to obtain some discipline. As a result of Cohen's evaluation, and based on her own observation, Barry, the head of the high school, had recommended against the renewal of Hoffmann's contract for the 1975-76 year. Despite the shortcomings, Cohen made a recommendation that the contract be renewed, with which Kaufman, the assistant headmaster concurred. Bosworth stated that although he had found a general sense of discontent concerning Hoffmann, on the part of some students with whom he had dealt, he decided

3/ The substance of these remarks by Cohen at the February 1975 meeting are not alleged herein to be unfair labor practices. They were the subject matter of a charge, together with other allegations not relevant herein, filed by Hoffmann on May 19, 1975. The major portions of his charge were dismissed by the Regional Director, and the remainder consolidated with the charges filed by another teacher against the Respondent. These cases were ultimately resolved by a formal settlement agreement dated October 28, 1975 providing for the entry of a Board order and Court judgment. The settlement agreement contained a nonadmission clause and subsequently the Respondent complied with the terms of the Board Order and was advised by the Regional Director on April 27, 1976 that those cases had been closed on compliance.

that the evidence at the time suggested that Hoffmann be given more of a chance as the school is a difficult one in which to work. Therefore Hoffmann's contract was renewed for the coming year.

5 During the first week of the new school year in September 1975
Hoffmann's classrooms were visited twice, once by Cohen and another time
by Barry. It was suggested to Hoffmann by Cohen that he learn the names
of his students quicker than he had. As a result of her visit Barry
had written Hoffmann a note requesting that he see her about something.
10 He did not go to see Barry until after having received a second note from
her some time later. During the entire school year 1975-76 Hoffmann's
classes, of which there were five, were visited approximately 20 times by
Cohen, 4 times by Barry and several other times by members of the
administration including Kaufman, Dunne, head of the middle school, and
15 Bosworth himself, who would look in for very short periods of time
upon occasion. Barry, who had contact with many of the students in
high school stated that she had received complaints from them, including
one at the very outset of the school year which prompted her own visit
during the first week of school. Most often she passed on the complaint
20 to Cohen without revealing the names of the students involved. According
to Cohen this increased the number of his observations because he received
requests not only from Barry but also from Dunne, and in addition had
some complaints directly made to him by students. From time to time
Cohen discussed some of his observations with Hoffmann and talked about
25 particular problems. With regard to the number of visits made by Cohen,
it is noted that during a discussion of the first evaluation written in the
spring of 1975, Hoffmann stated that Cohen had not observed him frequently
enough. In that year he had made approximately 12 observations. Cohen
also said that as part of his overall responsibility, he visited the
30 classrooms of all the teachers in the department in varying numbers depending
upon necessity of the situation.

 In December 1975 Cohen prepared another written evaluation which
is generally praiseworthy with respect to Hoffmann's physics class.
35 However he noted that his biology class was "somewhat marred by apathy
and distraction." He found that the students who were critical were the
same who provoked the distractions and they had to be dealt with by Hoffmann;
he noted that a variation in style and presentation might be more amenable.
Generally, Cohen concluded that Hoffmann's effectiveness was lost as a
40 result of a lack of rapport with the students who have "communicated an antipathy"
toward him. He said that students in all classes had expressed a lack
of respect for Hoffmann as a teacher. In his last evaluation dated
April 14, 1976, Cohen noted that Hoffmann's physics section had decreased
in size, that numerous students were absent or late, and the atmosphere
45 was strained and uncooperative. In the biology class he found that
discipline continued to be a problem and the students mocked Hoffmann and
did not respect him. Again in general science classes taught by Hoffmann,

5 Cohen stated that his observations revealed one section to be highly disorganized with a lack of order and discipline. He noted students sat facing in all directions and engaging in activities such as reading comic books and eating oranges. He also criticized Hoffmann's attitude towards these students. As he delivered a copy of this evaluation to Hoffmann, Cohen told him that it had been decided not to renew his contract for the coming year.

10 According to Respondent's administrators, other factors besides their personal observation of Hoffmann's classes were considered in the decision not to renew Hoffmann's contract. Notice was taken of the fact that the number of students enrolling in Hoffmann's physics class, an elective subject taken by junior or senior students in the high school, had declined and the administrators had been advised by some of the
15 students that they were seeking to avoid Hoffmann as a teacher. More important, in view of the school's objective in having its graduates admitted to the elite colleges, were the lower grades which students in Hoffmann's class were attaining in the college board achievement tests. This belief was confirmed by a series of studies and charts, 20 admittedly prepared during the course of the hearing in this matter, which portrayed the results and relative grades of students in Hoffmann's biology classes as compared with those in sections taught by other teachers. The students are required to take three successive courses in biology. Using the grades of students who were taught by Hoffmann in the second
25 of the three courses, it appeared that their percentiles declined from what they had achieved in the prior course, and rose when they took the third course after leaving Hoffmann's class. Respondent contends that for the sum of all these reasons a determination was eventually made not to renew the contract of Hoffmann.

30 Finally it should be noted that all teachers were subject to classroom observation in varying numbers according to the necessity. Also it appears that other teachers active on behalf of the faculty committee and the Union, and most particularly the other six signers
35 of the letter urging designation of the Union, were all renewed or offered renewal, and there is no evidence of any threats or reprisals taken against them.

C. Analysis

40 From the welter of verbiage adduced in this case, there emerges a very simple image. A teacher has engaged in concerted activities by virtue of his participation in the organization of and membership on a faculty committee, and was further involved in activity seeking to organize the
45 faculty of Respondent on behalf of the Union. Respondent's administrators admit being aware of Hoffmann's efforts on behalf of both the committee

and the Union. In addition, Hoffmann had filed an unfair labor practice charge against Respondent with the Board. All of these activities occurred during the end of 1974 and the early part of 1975. As a result of what may be gleaned from the background preceding the filing of the charges and the formal settlement in the prior case, referred to above, as well as the testimony of Bosworth and Barry at the hearing herein, it may be inferred that Respondent harbored an animus with regard to the Union. It is the contention of the General Counsel that the contract of Hoffmann was not renewed because of his activities approximately one year ago and that Respondent's motivation was demonstrated by alleged conduct which would have occurred also a year ago. There are no allegations of violations of the Act or evidence of conduct or statements exhibiting further antiunion animus which may have occurred in the intervening period. It is the burden of the General Counsel to establish that the failure to renew was motivated by Hoffmann's union or protected concerted activities, a burden, which I find, has not been fulfilled in the circumstances of this case. The previous cases involving the Respondent were settled formally with nonadmission clauses and have been closed by the Regional Director upon compliance and cannot of themselves be utilized to establish violations of the Act. Poray, Inc., 143 NLRB 716 (1963). However to some extent Respondent's presettlement conduct can be and has been introduced in an attempt to establish the motive of Respondent's post-settlement activities. Joseph's Landscaping Service, 154 NLRB 1384 (1965).

I have therefore taken cognizance that the evidence herein has established an antiunion animus on the part of Respondent and perhaps even extended to Hoffmann by reason of his having filed an unfair labor practice charge. However the existence of such elements above are not sufficient to establish that Respondent was unlawfully motivated when it refused to renew Hoffmann's contract a year later. No intervening event has occurred nor is there any evidence of contemporaneous statements manifesting such motive on the part of the Respondent. Furthermore I find the evidence insufficient to warrant a conclusion that Respondent, interminating Hoffmann, acted in such an arbitrary or capricious manner as would tend to indicate that its asserted reasons for that action were pretextual. It is no doubt true that an evaluation of a classroom teacher's performance based upon personal observation may frequently be determined by subjective factors. There are probably wide differences of opinion among educators on the question as to who is a good teacher, but that is not in issue in this case. The Respondent is surely entitled to determine for itself the standards it seeks in teachers. However the evidence does reveal a number of objective facts, most of which are undenied in this record. Thus Cohen's observation of students reading comic books in class, eating oranges, seated in disarray around the classroom, their lack of attentiveness to the teacher, the manner and tone of questions, remarks by the students

and responses by Hoffmann, are objective factors which provide a basis for his recommendation. Tests scores and comparison of the achievements of Hoffmann's students with those taught by other teachers provide further basis for a determination unfavorable to Hoffmann.

5 Another factor often indicating a discriminatory motivation is that of disparate treatment, evidence of which is lacking in this case. It is contended that Hoffmann was harassed by being observed more often than other teachers. While it is apparently correct that Cohen visited
10 Hoffmann's classroom 20 times whereas other teachers may have only been visited 12 times, the number does not appear exorbitant in view of the fact that Barry and other administrators had referred complaints to Cohen about Hoffmann from students, and Cohen himself had remarked earlier
15 in his first appraisal in April 1975 that Hoffmann had certain problems which required correction. In addition Hoffmann, upon receipt of that particular evaluation, had indicated to Cohen that he felt he had not been sufficiently observed. As to the visits from other administrators, it does not appear that Barry, for example, came to Hoffmann's classroom more than four times in the course of the 1975-1976 year, not an exorbitant
20 number it would seem. Also, as has been previously noted, no other teacher, who was active on behalf of the committee or was one of its members, or of the Union, had been refused renewal. In fact a number of them received raises although their activity was well known to Respondent.

25 Essentially, the issue here does not involve the correctness or fairness of Respondent's decision, the validity of students' complaints and actions, or the policies of Respondent in dealing with students or evaluating teachers. In short the Respondent may terminate a teacher for any cause and is not required to prove that its reason was a good one
30 or even a fair one. The burden falls upon the General Counsel to prove that the discharge was discriminatorily motivated under the Act. I find that the General Counsel has not established by a preponderance of the evidence that Respondent unlawfully refused to renew the contract of Hoffmann for a cause proscribed by the Act. Accordingly I shall recommend dismissal
35 of the complaint in this case.

Conclusions of Law

40 1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

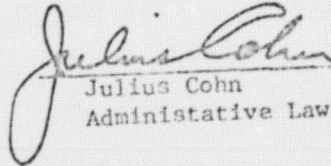
45 3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

Upon the foregoing findings of fact, conclusions of law, and the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: 4/

ORDER

The complaint is dismissed in its entirety.

Dated at Washington, D. C. FEB 7 1977


Julius Cohn
Administrative Law Judge

45 4/ In the event no exceptions are filed as provided by Section 102.46 of the
Rules and Regulations of the National Labor Relations Board, the findings,
conclusions, and recommended Order herein shall, as provided in
50 Section 102.48 of the Rules and Regulations, be adopted by the Board and
become its findings, conclusions, and Order, and all objections thereto
shall be deemed waived for all purposes.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

ST. ANN'S EPISCOPAL SCHOOL

and

Case Nos. 29-CA-4845
29-CA-4993

LAY FACULTY ASSOCIATION, LOCAL 1261
AMERICAN FEDERATION OF TEACHERS,
AFL-CIO

LAY FACULTY ASSOCIATION'S BRIEF
IN SUPPORT OF ITS EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDED ORDER.

Anthony Ficchio
Lay Faculty Association
260 Park Avenue South
New York, New York 10010

PRELIMINARY STATEMENT

Administrative Law Judge Julius Cohn issued his Decision and Order on February 7, 1977, in which he recommended that the Complaint in this matter be dismissed in its entirety with respect to Respondent St. Ann's Episcopal School.

STATEMENT OF THE CASE^{1/}

This case came before Administrative Law Judge Julius Cohn for hearing based upon a Complaint alleging, inter alia, that the Respondent, St. Ann's Episcopal School, herein referred to as Respondent and/or the School, violated Sections 8(a)(1)(3) and (4) of the Act. More specifically, the Complaint alleges that Respondent, by its supervisors, Bridgette Barry, William Everdell, and Peter Cohen intentionally harassed Robert Nicholas Hoffmann. They did so by excessive classroom observations, poor bi-annual evaluations, and eventually the termination of his teaching contract. This harassment resulted from Hoffmann's concerted activities, his activities on behalf of Lay Faculty Association, Local 1261, American Federation of Teachers, AFL-CIO, herein referred to as the Union, and his filing of charges with the National Labor Relations Board.

On June 10, 1976, the Respondent filed an answer to said Complaint denying the unfair labor practices imputed to it in said Complaint.

On July 27, 28, 29, 30, and September 2, 1976, a hearing on the matters was held before Judge Julius Cohn.

THE FACTS

Robert N. Hoffmann taught at Respondent for 3 academic years (Tr 17). He was originally hired as a member of the mathematics department but from the outset of his employment taught

1/ As used here, "JD" refers to the pages of the Administrative Law Judge's Decision, "GC" refers to General Counsel's exhibits, "RE" refers to Respondent's exhibits, "Tr" refers to the pages of the official transcript.

more science classes than mathematics (Tr 20-22). For the 7 years Hoffmann taught at the School he was an active member of the Science Department, teaching either 4 or 5 courses in that department a year. During his first year at the School, 1973-74, Hoffmann encountered few problems and he received no evaluation of his work from either the chairman of his department, Peter Cohen, or the numerous other administrators (Tr 24). His contract for the following year was routinely renewed.

On November 5, 1974, Hoffmann's second year at the School, word spread through the faculty that their paychecks, which were due that day, would not be distributed on time. As a result of this and other grievances the teachers had, it was agreed that a faculty committee would be formed with its goal to "establish better channels of communication with the administration" (Tr 32-33). Hoffmann was elected to this seven-person committee (Tr 34). Throughout the winter of 1974-1975 the committee managed to meet with Stanley Bosworth, the headmaster, about ten times (Tr 36). The subjects they discussed ranged from contracts to rehiring, and the gamut of working conditions (Tr 37). Bosworth's position concerning the committee is reflected in a memo he issued to the committee stating "...your committee was elected without mandate or machinery of any kind, that if your meetings are called to serve as a conduit between the faculty and me, then my response to its behavior must be relevant to that conduit" (GC 2). During the course of the winter, it was suggested to the faculty committee that the idea of having union representation be explored. Sometime in March 1975 Hoffmann was designated by the committee to explore and investigate the possibility of a union for it. Hoffmann immediately got in touch with the American Federation of Teachers and along with five colleagues went down to speak with Anthony Ficcio a business representative. A second meeting was arranged with

Robert Gordon, Vice President of the Union, for other interested members of the faculty (Tr 47-51). This meeting resulted in the decision to prepare and distribute to the faculty a letter introducing them to the Union (GC 3). Bosworth quickly responded by a letter to the faculty eight days later, that exhorts his staff to act cautiously before signing a Union authorization card and states "there are forms of authority and organization far more offensive to professionals and intellectuals than those you have experienced in this administration." "Beware lest a few in desperation attempt to pull it down." (GC 4). In more private conversations Bosworth muttered to his staff that if the faculty through its committee went too far he would leave and take all of the School's endowments with him (Tr 302). The Union continued its organizing efforts at the School until school closed for the summer.

There were three organizing meetings held with Gordon off the school's premises. Hoffmann introduced Gordon at one of these meetings and campaigned for the Union's acceptance. Both the headmaster's wife, Annie Bosworth, the School librarian, and the chairmen of the various departments were present at these organizational meetings (Tr 59-60, 62-63). In conjunction with the Union meetings, Union authorization cards were being circulated by "active" members of the faculty, which included Hoffmann, by hand and also through the mails (Tr 61). The organizing campaign was interrupted by the summer intersession. So far, to date, there has been no request for recognition by the Union nor has a representation petition been filed at the National Labor Relations Board.

Most of the Union and faculty committee activity emanated out of the Science Department since several of the department members were also members of either one or both committees--Ed Brady, Susan Jones, Charlie Arendt, and Hoffmann (Tr 747). In February 1975 a meeting of the Science Department was held at Brady's

apartment to "air" problems that had recently arisen in the department. Portents of future problems for Hoffmann were expressed by Peter Cohen when he relayed a message from Bosworth that Hoffmann was an organizer and spent all his spare time in that endeavor (Tr 68, 298). Cohen related that Bosworth had indicated to him to be prepared "to put something in writing" on Hoffmann to be used in the future and that he, Bosworth, would stand behind it. Cohen related that he had protested this prostitution of his duties and Bosworth threatened that if he wasn't prepared to follow orders someone else could replace him (Cohen) as chairman of the department (Tr 68-69). Subsequently, when Hoffmann questioned Cohen about this overt threat concerning his concerted activities, Cohen denied having personalized Bosworth's deposition request and broadened it to include the entire department (Tr 70). As a result of this threat Hoffmann filed charges at the National Labor Relations Board which were subsequently consolidated with charges that had been previously filed by another teacher, Patricia Palmiere.^{2/}

In the spring of 1975 the School instituted for the first time a formal system of evaluations for its faculty. When Hoffmann, who, based on Cohen's February remarks, was naturally curious to see how he would be evaluated, inquired as to his, he was informed by Cohen that he was having difficulty separating his politics from his teaching (Tr 74). Finally, at the end of May 1975, Hoffmann received his first written evaluation from Cohen. In summary, it compliments his work in physics but criticizes his relationship with the younger, middle-school (grades 4-8) children. Cohen cites discipline problems, a strained rapport, and a lack of sensitivity towards the students as Hoffmann's major problems with the middle-schoolers. No specific class, classes, or students are mentioned

^{2/} Case Nos. 29-CA-4361 and 29-CA-4211 were settled by Stipulation on October 28, 1975 (GC 5).

to document the criticism (GC 6). Despite the opposition of certain members of the administration, Hoffmann's teaching contract at the School was renewed for the 1975-1976 academic year (Tr 508-509).

From the first week of the new semester Hoffmann was subjected to almost constant class observations by various members of the administration, in particular Peter Cohen. Three days into the new school year he was observed once by Cohen and once by Bridgette Barry, head of the high school (Tr 78). By January 1976, a period of approximately four months, Hoffmann had been observed 14 times by Cohen and a total of 25 times by other members of the administration (Tr 81). These observations resulted in the written evaluation Hoffmann received in mid-January 1976. Once again, Hoffmann's physics course is generally praised, but his 8th grade biology section is cited for being "...marred by apathy and distraction" and Cohen suggests a variation in class style to remedy this problem. The last few paragraphs of the evaluation contain the essence of Cohen's criticism, which can be summarized as a generally "...strained student rapport" (GC 8). Hoffmann submitted to the administration a comprehensive response to Cohen's January 1976 evaluation. Hoffmann points out the lack of specificity and inconsistencies in the evaluation, and rebuts many of Cohen's assertions by elaborating on specific classes Cohen has observed, his own feedback from students and parents, and relating in detail the incidents referred to in Cohen's evaluation in a summary fashion. Hoffmann concludes with a reminder that in the past, prior to his Union activities, he received mostly compliments concerning his teaching and was seldom observed, suggesting that his new negative evaluation might be the result of his extracurricular activities (GC 9).^{3/} Hoffmann received his second evaluation for 1975-1976 on April 29, 1976, and it was at this time that he was informed by Cohen of the School's decision not to renew his teaching contract

^{3/} In his first year teaching for Respondent, Hoffmann was observed approximately seven times (Tr 22-23). In 1974-1975, Hoffmann approximates that he was observed a total of 10 times (Tr 75).

for 1976-1977 (Tr 82, 99, 104-105). By April of 1976 Cohen had observed Hoffmann a total of 25 times. In this third evaluation received by Hoffmann, Cohen, for the first time, becomes critical of Hoffmann's physics course. Where, in the January 1975 evaluation, Cohen states, in reference to the physics class that "The class is often challenged and the majority are involved in class sessions," he now described the class as "...dwindled in size and in my visits the classes are often small with numerous students absent or late." (GC 10). Cohen once again summarily characterizes Hoffmann's other four classes as lacking in discipline, disorganized, and generally lacking in student-teacher rapport. Hoffmann did not respond to this evaluation.

EXCEPTION ONE: THE ADMINISTRATIVE LAW JUDGE ERRED IN FINDING THE EVIDENCE INSUFFICIENT TO FIND THAT RESPONDENT, IN TERMINATING HOFFMANN, ACTED IN SUCH AN ARBITRARY OR CAPRICIOUS MANNER THAT WOULD INDICATE RESPONDENT'S ACTIONS FOR TERMINATING WERE PRETEXTUAL (JD 7, Lines 33-36)

It was not only the number of times Hoffmann was observed, but also the nature of the observations that show they were capricious and arbitrary.

For three years Hoffmann was a good teacher, rehired with raises. In the spring of 1975 the school formulated an evaluation procedure. When Hoffmann asked Cohen about his evaluation, Cohen remarked that he was having difficulty separating his politics from his teaching (Tr 74).

Three days into the 1975-1976 school year Hoffmann was observed once by Cohen and once by Barry (Tr 73). Their criticisms were that Hoffmann did not know the names of the students (Tr 769). They placed a great deal of emphasis on this. Mr. Hoffmann had a total of 75-85 students (Tr 769). Did Mr. Cohen know the names of all his students after only three days?

Mr. Frank, Respondent's attorney, during the cross-examination of Hoffmann, accused him of choosing a desk in the Science office behind a filing cabinet so he could not see Cohen

because of Hoffmann's antagonism towards Cohen (Tr 181). Really!

Regarding the assignment of a book, according to Frank, Tom Dunne, the head of the middle school, recommended students be given two weeks to read the book. Hoffmann gave students one and a half weeks. Respondent contended that a difference of two days was too short a time and bad teaching (Tr 206-208).

EXCEPTION TWO: THE ADMINISTRATIVE LAW JUDGE ERRED IN FINDING THAT THERE IS NO EVIDENCE OF CONDUCT EXHIBITING FURTHER ANTIUNION ANIMUS WHICH MAY HAVE OCCURRED IN THE INTERVENING PERIOD (JD 7, Lines 11-14).

The ongoing and excessive number of observations by Peter Cohen and other supervisors is evidence of further antiunion animus. Only because of the antiunion animus was there this number of observations. By April of 1976 (1975-1976 school year), Hoffmann had been observed 25 times by Cohen, plus observations by Barry, Dunne, Kaufman, and Bosworth.

These observations and the subsequent unfavorable evaluations stemmed from the antiunion animus, which the Administrative Law Judge found (JD 7, Lines 7-8). At the Science Department meeting held in the apartment of Brady, another Science teacher, Hoffmann testified, without rebuttal, that Cohen told him that Bosworth had told Cohen Hoffmann was an organizer and that they couldn't get him (Hoffmann) now but that he didn't know the law, but to put something in writing to be used in the future (Tr 67-69). This was the motivating factor for the observations. The Respondent was building its case to get rid of Hoffmann because of his union activities. These observations constitute further evidence of antiunion animus during the intervening period.

EXCEPTION THREE: THE ADMINISTRATIVE LAW JUDGE ERRED IN FINDING THAT THERE WAS NO DISPARATE TREATMENT OF HOFFMANN AND OTHER TEACHERS (JD 8, Lines 6-7).

Hoffmann was visited 25 times by Cohen (Tr 84), plus five other times by other administrators. Cohen told Hoffmann he visited a large number of times to be helpful (Tr 109). The record shows that Cohen, and Barry also, observed Hoffmann because he was having

trouble with his classes. Cohen said he had received calls from a parent or parents but was imprecise about number and names (Tr 110).

Cohen admitted that other teachers in the department had problems (Tr 758-761). Ed Brady, a teacher, had to have a class split up in the middle of the year because of lack of organization and discipline problems. Cohen observed Brady, who was having problems in two classes, 10-12 times (Tr 767). Hoffmann was observed more than 100% more often than Brady.

Much was made of Hoffmann's students being late for class, cutting, leaving early for extracurricular activities, and sitting wherever they wanted to. Yet Cohen testified that students at St. Ann's can sit wherever they want and can move desks (Tr 772).

Arendt, who taught at St. Ann's until the end of the 1975-1976 school year, testified that a large number of students at St. Ann's drop classes at the beginning of the term (Tr 304), had attendance problems in his class and all across the board. (Tr 305, 306), kids drifted in after the bell (Tr 305), there were so many extracurricular activities at St. Ann's that kids often left class early (Tr 308), lists of events were not always accurate (Tr 325).

EXCEPTION FOUR: THE ADMINISTRATIVE LAW JUDGE ERRED IN FINDING THAT BECAUSE NO OTHER TEACHER WHO WAS ACTIVE ON THE FACULTY COMMITTEE OR IN THE UNION HAD BEEN REFUSED RENEWAL, HOFFMANN WAS NOT DISCRIMINATED AGAINST (JD 8, Lines 20-24).

There is no argument with the facts. There was no question that Hoffmann was the organizer in the school and the administration was aware of this. In his decision the Administrative Law Judge credits Arendt and not Cohen regarding this (JD 4, Lines 1-12). The dispute here is the logic of the Administrative Law Judge's finding. Does an employer have to purge everyone who was active to one degree or another? Or will firing the accepted and known leader chill the

unionizing efforts? The answer is to get the leader, and this is what Respondent did. The remainder of the brief validates this logic.

EXCEPTION FIVE: THE ADMINISTRATIVE LAW JUDGE ERRED IN FINDING THAT THE GENERAL COUNSEL FAILED TO PROVE THAT THE FAILURE TO RENEW HOFFMANN'S CONTRACT WAS MOTIVATED BY HOFFMANN'S UNION OR PROTECTED ACTIVITIES (JD 7, Lines 14-17 and 29-31).

and

EXCEPTION SIX: THE ADMINISTRATIVE LAW JUDGE ERRED IN FINDING THAT THE GENERAL COUNSEL HAD NOT ESTABLISHED THAT RESPONDENT UNLAWFULLY REFUSED TO RENEW THE CONTRACT OF HOFFMANN FOR A CAUSE PROSCRIBED BY THE ACT (JD 8, Lines 31-34).

The Administrative Law Judge found antiunion animus on the part of the employer (JD 7, Lines 26-29), but relied on the fact in footnote 3 (JD 4, Lines 35-46) that statements made at the February 1975 meeting by Cohen are not alleged to be unfair labor practices and that the prior unfair labor practices had been closed on April 27, 1976, on compliance.

But two days later, on April 29, 1976, Hoffmann was informed by Cohen that his contract was not being renewed. This action was not in compliance with the compliance order but constitutes a fraud on the part of the employer.

The Respondent was out to get Hoffmann because of his union activities. How was this to be done in light of previous unfair labor practices and a compliance order? Very simply, the Respondent would attempt to make a case that Mr. Hoffmann was not a good teacher.

The record is clear that the evaluation procedures were instituted only after the teachers, led by Hoffmann, organized a faculty committee and subsequently attempted to form a bona fide union. The testimony of Hoffmann's supervisors is enlightening.

Bridgette Barry, head of the high school, testified that even prior to her employment at the School she had already received a negative impression of Hoffmann's teaching ability based upon a

day she had spent touring the School in the fall of 1974. With amazing clarity Barry recalled specific negative impressions she had received from Hoffmann's class during her brief visit, yet was unable to recall any other teachers she had observed that day (Tr 541). Barry did not begin her employment at the School until April 1975. Only one course that Hoffmann taught came within her purview as head of the high school, physics. Barry repeatedly stated that her lack of knowledge in physics, having never taken a physics course, hindered her own direct observations of Hoffmann's teaching ability (Tr 539-540, 558-559). The majority of her testimony was based upon oral complaints she received from students. The only student complaint Barry reported directly to Hoffmann was that of Andre Zugor. In this instance Hoffmann immediately requested a conference with the student, after which his work improved (Tr 526-527, 562-564). Barry inexplicably testified that she reported the students' complaints to Cohen since Hoffmann refused to see her, and yet later on states that Hoffmann came to her office occasionally to discuss students (Tr 527). She cited as an example of Hoffmann's reticence to visit her one incident that occurred the first week of school. Barry sent Hoffmann a note on September 22, 1975, approximately four days after school had resumed for the year and after her first observation, complimenting him on his class, suggesting that he should learn the students' names, and discussing the problem of a particular student (GC 7). Nowhere in this note does Barry mention any of the numerous complaints she allegedly received from students during that first week of school to forewarn Hoffmann that problems already existed in his class. On Friday, September 26, 1976, Barry sent Hoffmann a note requesting that he stop by her office to talk (RE 2). Hoffmann did meet with Barry promptly, on September 29, 1976 (Tr 521). Barry testified that numerous students, almost the entire class, complained about Hoffmann's teaching the first week of school, and yet not one written complaint from either a parent or a student was produced to

document these complaints. Hoffmann's physics students were for the most part juniors in the high school and not required to take the course during their junior year (Tr 150, 554). Why did they remain in his class if he was as awful as we are led to believe? Barry testified that she had noted during her observations of Hoffmann's physics class that students wandered in late and, when in attendance, did not receive answers to their questions. I am sure that, in her position as head of the upper school, she is well acquainted with the severe attendance and cutting problems that exist at the School, particularly in the early morning hours (Tr 306, 308). The record reveals that, in an effort to control the problem, the School posted daily lists of students who cut throughout the School for teachers to become acquainted with the students who were the greatest offenders. Hoffmann's failure to answer students' questions is in direct contradiction with a comment Cohen made in evaluating Hoffmann's teaching in December 1975, wherein he states "He uses the board well and responds directly to student questions..." (GC 8). I submit that Barry's animosity toward unionism and her belief that it is detrimental to private education in the United States may account for her totally negative perception and evaluation of Hoffmann's teaching abilities (Tr 550-551).

Peter Cohen, who observed Hoffmann's classes 25 times throughout the year, had worked with him for three years. It was not until April 1975, after Hoffmann's Union sympathies became notorious, that Cohen began to find fault with his (Hoffmann's) ability to teach. Cohen testified that one of the multitude of reasons he observed Hoffmann admittedly more than other members of the department was that Hoffmann was the weakest member of the department. Cohen admitted that other members of the department had problems in the classes and that one teacher, Ed Brady, had to have one of his classes divided up midyear when he failed to maintain order or organization in the classroom. Brady was simultaneously having a problem with his ecology elective. Why did Cohen only

observe Brady's classes less than half the number of times he visited Hoffmann's? (Tr 758-761, 767). Brady is still being retained as a teacher by Respondent (Tr 760). Cohen testified to specific incidents he observed while in Hoffmann's classes. Once again Hoffmann is criticized for failing to know the names of all his students after the third day of school (Tr 769). Cohen testified that on March 16, 1976, he observed a lecture on neurophysiology in biology which was too complex and all but the brightest students were inattentive (Tr 730-731). In his evaluation of April 14, 1976, he appears to be complimenting Hoffmann on his sophisticated presentation of neurophysiology (GC 10). He also comments that Hoffmann has introduced additional labs pursuant to constructive criticism he made after a visit on March 11, 1976. It is difficult to refute the other general complaints of "hostility in the classroom" and "frustration." I can only assert that no student or parent testified to these problems and there have been no written complaints introduced in an effort to document them.

Respondent's witness, Katharine Logue, Assistant to the Assistant Headmaster, Linda Kaufmann, testified concerning various charts she had prepared to buttress the School's contention that Hoffmann's students did poorly on standardized examinations in an effort to present objective evidence of the poor quality of his teaching. Firstly, it should be pointed out that these charts and comparisons were drawn up long after the decision not to renew Hoffmann had been made. At most, the School had available only the raw scores of each student. It became readily apparent from examining just a small portion of the raw data used compiling the graphs that the comparisons were not valid. Throughout the charts Logue used the scores of students who had an opportunity to take second examinations and compared them with Hoffmann's students who only had the opportunity to take their examinations once. This rather lopsided comparison was presented by Respondent in an effort to support objectively its assertions concerning his teaching. On

one chart, Respondent's Exhibit 10, the poor performance of Hoffmann's students was illustrated by showing their scores on an examination two years and two teachers subsequent to the students having been in Hoffmann's class (Tr 842). Respondent's Exhibit 12 shows Hoffmann's examination scores for 1973-1974, two years prior to this decision not to renew his contract (Tr 813). Weren't these scores available after his first year of teaching? I submit that all the testimony of Logue and Respondent's Exhibits 10 through 17 should be discounted on two major grounds: relevancy--they were not a contributory factor in the decision not to renew his contract due to the fact that they did not exist until after the decision had been made; and secondly, inaccuracy and unreliability--they do not represent a valid comparison due to the intermixing of retake scores.

At a biology department meeting Cohen made a comment about biology scores.

Question: "What did he say?"

Hoffmann: "He referred to the test as a 'crock of shit.'" (Tr 216)

Cohen also made remarks about biology scores going down, even though the scores weren't in yet (Tr 215, 216).

Regarding a standardized test in chemistry given during the 1974-1975 school year, Arendt testified that the test scores were slightly above the national average. The results were predictable. Good students did very well, the poor students did poorly (Tr 317).

Some things become quite obvious. (1) Hoffmann is fired on April 29, 1976. (2) Three months after the firing, a relatively high administrator is assigned to develop a case based on test scores that Hoffmann was a bad teacher. (3) Only raw data were available prior to Hoffmann's firing, and it was impossible for anyone to know what it took Ms. Logue months to put together. (4) Cohen, who was Hoffmann's immediate supervisor and whose

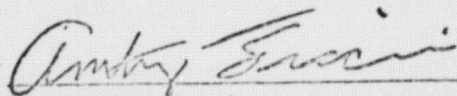
evaluations and recommendations were primary in the decision to fire Hoffmann, was not aware of the scores and thought they were "a crock of shit" anyway.

CONCLUSION

It is respectfully requested that the Board find the Respondent St. Ann's Episcopal School violated Sections 8(a)(1) (3) and (4) of the Act. It is further respectfully requested that the Board provide the appropriate remedies.

Dated at New York City, New York, this 11th day of March, 1977.

Respectfully submitted,



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CWA:1141/meb
11 March 1977

230 NLRB No. 21

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JPW

D--2548
Brooklyn, N.Y.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ST. ANN'S EPISCOPAL SCHOOL

and

LAY FACULTY ASSOCIATION,
LOCAL 1261, AMERICAN FEDERATION
OF TEACHERS, AFL-CIO

Cases 29--CA--4845 and
29--CA--4993

DECISION AND ORDER

On February 7, 1977, Administrative Law Judge Julius Cohn issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order

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230 NLRB No. 21

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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LAY FACULTY ASSOCIATION, LOCAL 1261, AMERICAN FEDERATION OF TEACHERS, AFL-CIO	:	
Petitioner	:	
v.	:	<u>PETITION FOR REVIEW</u>
NATIONAL LABOR RELATIONS BOARD	:	
Respondent	:	
-----		X

The Lay Faculty Association, Local 1261, American Federation of Teachers, AFL-CIO, hereby petitions the court for review of the Order of the National Labor Relations Board adopting the order of the Administrative Law Judge who dismissed the complaint herein, entered on June 10, 1977.

JAMES R. SANDNER
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Dated July 8, 1977